Supreme Court, U.S.
FILED
FEB 15 1983
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82-1382

IN THE

Supreme Court of the United States

October Term, 1982

No. .....

In the Matter of the Application of WALTER TOLUB, individually and on behalf of the Association of Law Secretaries, et al.,

Appellants,

—v.—

HERBERT B. EVANS, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Question Presented

Whether the Equal Protection Clause of the Constitution is violated by a New York State statutory scheme, which discriminates between employees who perform the same work and who have the same professional qualifications, where the prime justification for paying some employees less than others is that it saves money?

Parties to the Proceeding

The parties to the proceeding are too numerous to be listed in the caption. Their names are set forth in the opinion of the New York State Supreme Court. App. A, *infra*, pp. 1a-3a.

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Opinions Below

The opinion of the New York State Supreme Court (Special Term, N.Y. County) (App. A, *infra*, pp. 1a-14a) is not reported. The Appellate Division of the New York State Supreme Court (First Department) affirmed the judgments of the New York State Supreme Court without opinion and granted leave to appeal to the New York Court of Appeals (App. B, *infra*, pp. 15a-18a). The opinion of the New York Court of Appeals (App. C, *infra*, pp. 19a-30a) is not yet reported.

Jurisdiction

The opinion and judgment of the New York Court of Appeals, holding that "the various provisions of the [New York] Judiciary Law which provide the method of computing salaries for law assistants serving in the unified court system [do not] violate the petitioners' right to equal protection of the law", was entered on November 18, 1982 (App. C, *infra*, p. 19a). The notice of appeal was filed on February 9, 1983 (App. D, *infra*, pp. 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2), which authorizes a direct appeal to this Court from a final judgment rendered by the highest court of a state where there is drawn into question the validity of a statute of any state on the ground that it is repugnant to the Constitution of the United States, and the decision is in favor of its validity.

Constitutional Provisions and Statutes Involved

The Equal Protection Clause of the 14th Amendment to the Constitution and Section 39(8)(a) and 39(8)(b) of the New York Judiciary Law are set forth at App. E, *infra*, pp. 33a-34a.

Statement

A. The Statutory Scheme

The Supreme Court of the State of New York is the highest court of original jurisdiction in New York. Although it is a statewide court and its Justices are employees of the State of New York, until April 1, 1977, law clerks—then called law secretaries—who worked for Justices in New York City were paid by the City, while their counterparts outside the City were paid by New York State.

On April 1, 1977, all law clerks whether employed in New York City or elsewhere, became employees of New York State. The statutory scheme which affected this change, however, created a significant disparity in the salaries paid those law clerks who had been previously paid by New York State and those who, while performing an identical service for a New York State Supreme Court Justice, for the same period of time, had been paid by the City of New York. While all of the law clerks in the trial level courts were assigned a grade on the basis of the number of years they had been admitted to the bar, salary assignments within each grade differed depending on which entity had paid the law clerks prior to April 1, 1977. Those law clerks who had previously been State employees were assigned an incremental step within their grade based on the incremental step they had previously attained in state service. On the other hand, law clerks who previously were paid by New York City were assigned to the incremental salary level within the grade that would come closest to equalling their prior salary without regard to the length of their prior service. The effect of this statutorily mandated scheme was summarized in the opinion below (App. C, *infra*, pp. 21a-22a):

> An employee who was previously paid by the State at grade 31 level with five years of increments remained at that salary. An employee previously paid by the City of New York and admitted to the bar five or more years would be assigned to grade 31, but the incremental level would be determined not by the numbers of years of service but by the employee's previous City salary. Thus, that employee may have eight years of service but be placed on the third incremental level if that was sufficient to insure that his present State salary would be equivalent to or greater than

that paid by the City. As a result of this disparity, petitioners receive less salary than some prior State-paid employees with the same number of years of service. Additionally, although they receive the same percentage salary increases, the actual increase they receive is smaller than that received by prior State employees because the base on which the percentage is computed is smaller.

B. The Proceedings Below

The appellants are law clerks to Justices of the Supreme Court of the State of New York who were employed in the City of New York prior to April 1, 1977, and who were adversely affected by the salary disparity between themselves and those law clerks who were employed elsewhere in New York State. They commenced proceedings in the New York State Supreme Court seeking, *inter alia*, a judgment declaring unconstitutional—on equal protection grounds—the provisions of the New York Judiciary Law which prescribed the salary disparity.

The New York State Supreme Court (Special Term, New York County) held that: "This statutorily mandated difference in salary-grade allocation does not constitute a denial of equal protection. And the fiscal constraints of the State provide a natural basis for the classification" (App. A, *infra*, pp. 11a-12a). The Appellate Division affirmed the judgment without opinion and, *sua sponte*, granted leave to appeal to the New York Court of Appeals.

The New York Court of Appeals, in a 4-2 decision, affirmed the judgment sustaining the constitutionality of the discriminatory statutory scheme. After conceding

the existence of the disparity described above, between law clerks who were paid by New York City and those paid by New York State prior to April 1, 1977, the Court of Appeals found that the New York State Legislature had a rational basis "for designating different formulas to convert the salaries of prior State-paid employees and prior City-paid employers into a unified salary scale". Specifically, the Court of Appeals majority found (App. C, *infra*, p. 24a):

> The prior State-paid employees had been under a similar system making a direct transition regarding increments feasible. City-paid employees, on the other hand, were being paid under a completely different system. Thus, the Legislature chose to incorporate them into the State salary schedule, using their prior salary as a guide to the incremental level they should be placed at. This system assured that the cost of unification would be reasonably controlled and that no one would suffer any loss in salary. Thus, it cannot be said that the statutorily mandated system was irrational.

Perhaps recognizing that a desire to save money could not justify the discriminatory scheme at issue, the majority opinion observed that the elimination of the wage disparity would have required "individual evaluation" to ascertain how many years of petitioners' service—prior to April 1, 1977—was "comparable" to that of their counterparts outside New York City (App. C, *infra*, pp. 24a-25a). Although appellants only seek to have their prior service as law clerks to New York State Supreme Court Justices considered in the same way that prior service by their counterparts elsewhere are considered, which would require no more than a ministerial act, and although the appellees did not suggest otherwise, the majority concluded that the desire of the Legislature to avoid an "individual evaluation" provided a further "rational

basis" to discriminate between petitioners and their counterparts elsewhere in New York State.[1]

The dissenting opinion in the Court of Appeals rejected, as wholly "outlandish", the effort of the majority to justify the discriminatory salary scheme which appellants challenged. Judge Fuchsberg, who authored the dissenting opinion, observed that it was "undisputed" that, if anything, "the greater complexity and volume of litigation pending in the courts of the City of New York render [appellants'] tasks more onerous" than that of their counterparts elsewhere. Accordingly, "discrimination in favor of, rather than against them, would appear to be the only kind that could be in order." (App. C, *infra*, p. 28a). Specifically, Judge Fuchsberg observed (*Id.* at p. 29a):

> The issue here is not whether the Legislature had the right to save money when it embarked on the court unification plan. Rather, it is whether the State could enact a statute which imposes a disproportionate share of the costs of its scheme on one class of persons. Certainly, respondents would not contend that the Legislature could constitutionally justify a decision to give redhaired law secretaries lower salaries than all others simply by claiming that it did not have enough money to pay all law secretaries equal salaries. For identical

[1] The majority opinion also alluded to the fact that petitioners were allowed to retain certain fringe benefits that their counterparts outside New York City did not receive. Although the majority did not suggest that the fringe benefits which petitioners were permitted to retain after April 1, 1977, were sufficient to make up for the loss petitioners suffered as a result of the disparate salary scheme to which they were subject—indeed they are not—it found it to be of some relevance.

reasons, the State cannot use that justification to support its discriminatory treatment of petitioners who were classified on a similarly arbitrary basis, i.e., the identity of the government unit that paid their salaries prior to April 1, 1977. In short, "fiscal constraints" alone cannot justify disparate treatment of equals.

The Questions Are Substantial

The holding below, which sustained the constitutionality of a concededly discriminatory salary schedule, raises a question of particular significance at a time when federal, state and local governments are operating under severe fiscal conditions. The issue is not whether it is reasonable for such entities to seek to limit the salaries paid to employees. Instead, the issue is whether such savings must be accomplished in a fair and rational way or whether, instead, a legislative body may adopt patently discriminatory classifications. Indeed, what makes the statutory scheme here so unnecessarily arbitrary is the fact that New York State could have saved more money by treating all law clerks in the same manner as it treated those employed in New York City. The decision to pay those employed in New York City less, in order to save money, smacks of the kind of legislative fiat that cannot be reconciled with the policies underlying the Equal Protection Clause. While the state judiciary may be reluctant to strike down legislation that may result in increased fiscal cost, it was the purpose of Congress in providing a direct appeal in the circumstances here, to insure that fundamental rights guaranteed by the Constitution are not so easily trampled upon.

1. The New York State Legislature could not, without some rational basis, enact a statutory scheme which discriminates between employees who have performed the same work, for the same period of time, and who have

the same professional qualifications. "The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes * * * It also imposes a requirement of some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager*, 384 U.S. 305, 308 (1966). Indeed, recognizing the force of this principle, the New York Court of Appeals—only a few months earlier—struck down a legislative scheme which discriminated between salaries paid to District Court Judges in adjoining counties. *Weissman* v. *Evans*, 56 N.Y. 2d 458 (1982). Specifically addressing the argument that the disparity simply continued the practice that existed when District Court Judges were paid by the local entities in which they sat, Judge Fuchsberg—here writing for a unanimous Court of Appeals—observed (56 N.Y.2d 466):

> That the two separate counties compensated their District Court Judges differently (not then subject to equal protection analysis), whatever the asserted justification for that difference, is immaterial to consideration of the claim that there is no warrant for differentiation by the now single employer, the State of New York.

The appellants here, like their counterparts elsewhere in New York, are now compensated by "a single employer, the State of New York" and they perform the same work. The fact that, once having been made employees of the State of New York, it would have cost New York more money to pay the appellants the same salary as their counterparts cannot provide a rational basis for denying them the equal protection of the laws. As this Court observed in *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969):

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accom-

> plish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money.

Particularly apposite is the holding of this Court in *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966). In that case a New Jersey statute imposed the cost of a transcript upon an indigent appellant who had been convicted of a crime and was sentenced to prison and who then was unsuccessful on his appeal. The statute, however, did not impose that cost upon the indigent appellant who likewise was convicted of a crime, and was unsuccessful on his appeal, but who had received a suspended sentence or who had been placed on probation or who had been fined rather than sentenced to prison. The distinction the New Jersey statute drew between appellants was based only upon the nature of their punishment. Although the distinction saved New Jersey money, this Court held that a punishment distinction had no rational connection with a transcript cost. Mr. Justice Stewart, in speaking for the Court, wrote (384 U.S. 308-309):

> "'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same' [citations omitted]. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" *Baxstrom* v. *Herold*, 383 U.S. 107, 111; *Carrington* v. *Rash*, 380 U.S. 89; *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 37; *Royster Guano Co.* v. *Commonwealth of Virginia*, 253 U.S. 412, 415.

Here, too, the basis for distinguishing between appellants and their counterparts elsewhere has no relevance "to the [asserted] purpose for which the classification is made." *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1965).

Moreover, in the circumstances here, it is no answer to argue, as the respondents did below, that the salary disparity from which appellants suffer "was rationally related to the State's assumption of local court costs and the establishment of a unified budget" (Br., p. 45). Although they were paid by New York City prior to April 1, 1977, the appellants, like their counterparts elsewhere in New York, served as law clerks to Justices of the Supreme Court of the State of New York. The Justices were employees of the New York State and it is not disputed that appellants performed the same service as their counterparts elsewhere. The salary differences which existed between the appellants and their counterparts prior to April 1, 1977, are thus difficult to reconcile in light of the identical nature of the work that they performed for the State of New York. The perpetuation of these irrational differences, simply because it would cost more money to eliminate them, is no answer to the contitutional defects in the statutory scheme. More significantly, the Legislature could have saved more money, if that were its purpose, by paying everyone the same salary as the appellants. There is no rational basis to single out appellants for disparate treatment merely because an earlier anomolous statutory scheme required New York City, rather than New York State, to pay them.

2. The "administrative" inconvenience of according appellants equal treatment, to which the Court of Appeals also alluded, is without basis in fact and law. The majority opinion suggested that the elimination of the salary disparity would require an "individual evaluation" to ascertain how many years prior to April 1, 1977—the date on which appellants became employees of New York State—they held positions "comparable" to their counterparts elsewhere. The appellants, however, only seek to

have their prior service as law clerks to New York State Supreme Court Justices considered in the same way that prior service by their counterparts elsewhere is considered. This involves no significant administrative burden and the opinion below does not suggest otherwise; indeed, even if an "individualized evaluation" was required, it could hardly provide rational basis for a discriminatory statutory scheme without some evidence that such an evaluation would pose an onerous, if not impossible, burden.[2] Otherwise a state could justify the most arbitrary and patent discrimination simply because it did not wish to undertake the minimal effort required to treat its citizens equally.[3]

Conclusion

Probable jurisdiction should be noted.

Respectfully submitted,

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[2] See, e.g., *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966), holding that "minimal" administrative inconvenience cannot provide a rational basis for an otherwise unreasonable classification.

[3] The final fact alluded to by the Court of Appeals was that the appellants were permitted to retain greater fringe benefits than their counterparts elsewhere in New York (App. C, *infra*, p. 25a). The short answer to this argument is that, even taking these fringe benefits into account, the appellants are still worse off than their counterparts elsewhere and the majority did not suggest otherwise.

APPENDIX A

Findings of Fact and Conclusions of Law

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM:
PART I

Index No. 2930/80

IN THE MATTER OF THE APPLICATION OF WALTER TOLUB, DONALD COLONELLO, ROBERT C. KOHM, IRVING LEVINE, RICHARD WAGNER, JOSEPH GOLIA, NICHOLAS SAVINO, VASILIOS ARNIZOTES, CALVIN CONNELL, KATHLEEN CASEY, THOMAS KEHOE, ANGELA MAZZARELLI AND DAVID ROSENBERG, individually and on behalf of the Association of Law Secretaries to the Justices of the Supreme and Surrogates' Courts of the City of New York, and PEARLE APPELMAN, JACOB ASCHKENASY, ALBERT ASPINELL, WILLIAM E. BANFIELD, IRENE BEES, PATRICIA BROADBELT, WILLIAM K. BROUDY, PASCHAL D. CASTELLI, HARVEY CORN, WILLIAM DUGAN, PAULA B. FENTON, WALLACE L. FORD, LEONA FREEDMAN, GEORGE J. GARAFOLA, PAUL GARLAND, HARVEY GLASSER, DAVID GOLDSTEIN, LELAND GREENE, JOHN GRIMMER, RICHARD S. HUGHES, LENDSEY JONES, DAVID A. KORNBLUM, ORIN R. KITZES, RUTH STARR KORN, DANIEL T. KUZYK, PATRICK LEDDY, GERALD S. LEVINE, BURTON N. LIPSHIE, SHARON LUNDSTROM, VIVIAN MCGOWAN, VINCENT T. QUATROCHI, NATHAN RAVNER, HOWARD ROSEMAN, MARC I. SALIS, ROBERT J. SALZBERG, IRWIN L. SCHARF, EUGENE H. SCHIFRIN, LEONA SHARPE, JACQUELINE SILVERMANN, PAUL SOBELL, MICHAEL D. STALLMAN, ESTATE OF SAMUEL TOLISANO, VINCENT A. VITALE, MURRAY WEINER, MALLALIEU S. WOOLFOLK, ANTONIO BRANDVEEN, GAIL BURROUGHS, LORIN DUCKMAN, MILTON GREEN, FRANK HANTKE, BARRY HILL, ALEXANDER HUNTER, EDWARD KAUFMAN, GERALD LABUSH, GEORGE LEVINE,

NICHOLAS X. MARANZANO, GEORGE PARKER, MELVIN PAROFF, LESTER RIVELIS, MATT ROSEN, WILLIAM TRAYLOR, BEN R. BARBAGALLO, VICTOR BARRON, JAMES V. BUCCELLATO, ANTHONY J. BUFFALANO, WILLIAM F. CAMPBELL, JOHN R. CANNIZZARO, STANLEY CLARK, ROBERT GRAIG, SANTO CRUPE, ALLEN DAVID, LOUIS DIESENHOUSE, EDWARD J. DONOVAN, HARRY A. ELISOFON, MICHAEL FORMOSO, MICHAEL FREEMAN, WILLIAM J. GIORDANO, WARREN GLASNER, IRVING GOLDENBERG, SIDNEY GOODHEARTZ, JOSEPH P. GRANCIO, MARTIN HORN, MURIEL HUBSCHER, JAMES HUTCHERSON, GABRIEL M. KRAUSMAN, LESTER KRAVITZ, DONALD MARCOVITZ, DOUGLAS A. MILAZZO, ALFRED P. MOLINE, JR., JAMES MURPHY, STANLEY S. NIRENBERG, PATRICK J. PAGNANI, MILTON L. PLATT, ALFRED J. RIVERA, GERARD H. ROSENBERG, HERMAN SANDERS, MARK A. SMITH, CHARLES SPORN, DAVID VANDERPOOL, GEORGE E. WADE, JR., ROBERT WITTICH, DAVID AVRACH, SYLVIA BECK, ROBERT DUNLEAVY, ALBERT CERUSSI, MARILYN LASHIN, PATRICK LEDDY, HERMAN OFFEN, RAMON PAGAN, WILLIAM POPPY, LEON SCHECHTER, LEE SCOPP, RICHARD TOLCHIN, ERIC TOPPIN, STEVE BOOKIN, HAROLD BEELER, ALBERT ASPINALL, GEORGE GARAFOLA, JOHN RANIOLLA, JOSEPH G. BRAUNREUTHER, HAROLD F. CULLEN, ARNOLD N. PRICE, NAT WEIDENBAUM, JAMES C. MOSLEY, ABRAHAM BERKOWITZ, DANIEL LEWIS, JOSEPH RISI, PHYLLIS FLUG, GLORIA CIRINO, JEFFREY LEBOWITZ, RONALD SOMMER, RICHARD L. BUCHTER, ROBERT S. INVIDIATA, BRUNO SZAKMARY, THOMAS V. POLIZZI, TIMOTHY FLAHERTY, PETER M. DUFFY, MORRIS FIERSON, JOSEPH A. BONDANZA, JR., BERNARD R. MENDELOW, NATHAN STEINER, HUGH SCOTT, STUART SPITZER, SIDNEY SCHNEIDER, TERRENCE A. FLYNN, JOHN CARTAFALSA, EUGENE MATTHEWS, ROBERT L. NAHMAN, WALTER

Findings of Fact and Conclusions of Law

A. LASKE, DAVID ROSEN, ALAN LEVINE, BLANCHE R. LIFTOFF, PETER MENOUDAKIS, ROGER N. ROSENGARTEN, STANLEY KATZ, MARVIN K. SCHARF, ROBERTA L. DUNLOP, EUGENE BAMBRICK, JERALD LEVINE, EDWARD SCHACHTER, IRA HOFHER, DOMINICK REVELLINO, WILLIAM DERKASCH and JOHN DOE, 1-20,

Petitioners

—against—

HERBERT B. EVANS, as Chief Administrative Judge of the State of New York, LAWRENCE H. COOKE, as Chief Judge of the New York Court of Appeals, E. LEO MILONAS, as Deputy Chief Administrative Judge for the City of New York, HOWARD F. MILLER, as Director of the Budget of the State of New York, THE OFFICE OF COURT ADMINISTRATION of the State of New York, and THE STATE OF NEW YORK,

Respondents,

for a judgment pursuant to CPLR Article 78.

These consolidated actions are brought by named law secretaries ("Petitioners"), law secretaries to Justices of the Supreme and Surrogate's Courts in New York City against Herbert B. Evans, Chief Administrative Judge of the State of New York; Lawrence H. Cooke, Chief Judge of the State of New York; E. Leo Milonas, Deputy Chief Administrative Judge for the Courts in New York City, and the Office of Court Administration of the State of New York ("State respondents"). Petitioners claim that the Court and State respondents have arbitrarily and unlawfully failed to equalize salaries between petitioners and prior State-paid law secretaries with comparable years of service. In Action No. 1 (the Article 78 proceeding), petitioners seek an order directing the Court and State respondents to end the alleged salary disparities. In Action No. 2 (the declaratory judgment action),

petitioners seek a judgment declaring the alleged failure to equalize salaries to be unconstitutional under the Federal and State Constitutions. Petitioners also seek retroactive salary adjustments based upon the claimed disparities.

This Court finds that there is no legal authorization for any salary increases for petitioners, that there are no material disparities in total compensation between petitioners and prior State-paid law secretaries, and that to the extent that some inequality in salaries may exist, petitioners have not been denied equal protection of the law.

FACTS

Prior to April 1, 1977, law secretaries to Supreme Court Justices in New York City were paid by the City. On April 1, 1977, law secretaries were transferred from the City payroll to the State payroll, as part of the State's assumption of local court costs pursuant to the Unified Court Budget Act of 1976 (Section 39 of the Judiciary Law). Approximately 8,500 other court employees paid by the City and by various other local fiscal authorities, also were transferred to the State payroll pursuant to the Act.

A. The Classification Plan

In order to assure a coherent method of assimilating heretofore locally-paid employees onto the State payroll, the Legislature directed that the Administrative Board of the Judicial Conference (whose powers and duties have now been assumed by the Chief Judge of the Court of Appeals) adopt a classification structure for these new employees. Judiciary Law, Section 38(8)(a).

The new Classification Plan, which was adopted by respondent Evans on May 28, 1979, took the hundreds of positions that were paid by the varied localities, and the

positions that were previously paid by the State, and placed them in a uniform classification structure based upon (i) the duties and responsibilities of the position and (ii) the volume of work in the court or agency in which the position existed. The Plan also allocated each court title to a judicial salary grade.

Under the Plan, all law secretaries transferred to the State payroll, including petitioners, were classified to new titles and allocated to judicial salary grades based upon their years of admission to the Bar. The new titles and salary grades for law secretaries in trial-level courts are:

YEARS OF ADMISSION	*TITLE*	*SALARY GRADE*
Not yet admitted	Law Clerk to Judge	24
2 Years	Senior Law Clerk to Judge	26
3 Years	Associate Law Clerk to Judge	28
5 Years	Principal Law Clerk to Judge	31

B. Petitioners' Salary History

Pursuant to Section 39(6)(a) of the Judiciary Law, law secretaries in New York City were placed on tht State payroll on April 1, 1977 at their then-current City-paid salary of $27,787. This was considered their base salary. They, thereafter, received salary increases of 5%, 4%, and 5%, effective April 1, 1977, October 1, 1977, and April 1, 1978, respectively and also, increment-step increases identical to those granted to prior State-paid law secretaries.

Law secretaries with no prior State service employed between April 1, 1977, the date of the State takeover, and May 28, 1979, the date of the adoption of the new Classification Plan, were hired at a salary equal to the statu-

tory salary grade 31 level set forth in section 38 of the Judiciary Law. The received salary increases in accordance with revisions to the State salary charts set forth in section 38 and received increment-step increases in accordance with section 37 of the Judiciary Law.

C. Prior State-paid Law Secretaries

Prior to April 1, 1977, law secretaries in the Court of Claims and in the Supreme Courts in the 3rd through the 1st Judicial Districts were paid by the State. Those in the Court of Claims and in the 3rd, 4th, 6th, 9th and 10th Judicial Districts were allocated to salary grade 31 in 1974; those in the 5th, 7th and 8th Judicial Districts were allocated to salary grade 31 between January 1 and March 31, 1977. Pursuant to Section 37(4)(a) of that law, they became entitled to increment-step credit within grade 31 for their years of State service prior to allocation. (See, Totero v Levitt, 41 NY2d 1002 [1977]).

D. The Effects of the Classification Plan

(1) New York City Law Secretaries

Judicial salary grades contain a minimum starting salary for the first year of service, increment steps for the next four years of service, a longevity step for the sixth year of service, and an extra longevity step for the eleventh year of service. See, Judiciary Law, Section 37 (1), 38(1). Each step increase represents a salary increase of approximately 3½%.

Pursuant to section 39(8)(b) of the Judiciary Law, employees transferred to the State payroll were placed into the salary grades determined under the new Classification Plan, either at the salary received immediately prior to allocation, or at the minimum of the assigned salary grade, whichever was higher. Section 39(8)(b) further required that employees with salaries above the minimum of their assigned grades be placed into an in-

crement step which corresponded to those salaries; the Chief Administrative Judge had no discretion in determining increment-step placements within salary grades. Since all law secretaries in New York City were above the minimum of the various salary grades to which they were assigned, they were placed into those grades at increment steps that corresponded to their salaries immediately prior to allocation. Movement within the salary grade was then determined by section 37 of the Judiciary Law.

(2) Prior State-paid Law Secretaries

Under the new Classification Plan, all prior State-paid employees were classified to new titles, but retained the salary grades to which they had previously been allocated. As a result, prior State-paid law secretaries were all classified to Law Clerk to Judge titles at salary grade 31, the same salary grade they held prior to the implementation of the Classification Plan. Their salaries were not affected by the Plan.

E. The Claimed Salary Disparities

Since the State takeover on April 1, 1977, prior City-paid law secretaries have received the same percentage salary increases received by prior State-paid law secretaries. Before April 1, 1977, however, the salaries of prior City-paid and State-paid law secretaries were fixed by different fiscal authorities, and were based on different criteria. City-paid law secretaries all received the same annual salary, as fixed by the City, regardless of their length of service or their years of admission to the Bar. State-paid law secretaries, on the other hand, were paid pursuant to a plan, which contained increment steps based upon years of State-paid service in the same title.

Since City-paid law secretaries were allocated to State salary grades based upon their salaries at the time of allocation, irrespective of the number of years of local

service, some salary disparities exist among prior City-paid and prior State-paid law secretaries with comparable years of service. Among law secretaries hired prior to October 15, 1975, the salary range both at the top and bottom of the pay scale is higher for prior State-paid law secretaries than it is for prior City-paid law secretaries. Among those law secretaries hired between October 15, 1975 and April 1, 1977, the situation is reversed and the salary range both at the top and bottom of the pay scale favors the prior City-paid law secretaries over their prior State-paid brethren.

For those law secretaries hired after April 1, 1977, the effective date of the State take-over of the court system, there is equality at the lower end of the pay scale, but prior City-paid law secretaries enjoy higher salaries at the upper end of the pay scale, compared to prior State-paid law secretaries.

F. Fringe Benefits

Apart from the salary advantages enjoyed by some prior City-paid law secretaries, all prior City-paid law secretaries enjoy significantly greater fringe benefits than those enjoyed by prior State-paid law secretaries.[1] While all law secretaries receive the same basic health insurance coverage, all prior City-paid law secretaries and their families are provided with additional insurance coverage, including life insurance, supplemental medical insurance, dental insurance, and optical insurance—benefits not provided to prior State-paid law secretaries. However, these fringe benefits do not constitute "salary" within the purview of Judiciary Law section 39(6)(c) and cannot be

[1] Prior City-paid law secretaries retain the insurance benefits they previously received from the City. Judiciary Law § 39 (6)(e). Prior State-paid law secretaries receive insurance benefits pursuant to a contract negotiated with the Unified Court System by the Civil Service Employees Association (CSEA).

added into the equation for the purpose of determining comparability of salary.

There is no factual dispute between the parties. Both sides acknowledge that a State-paid Law Clerk on the payroll before the State takeover of the New York City Courts earns more than a prior City-paid Law Clerk with the same seniority, even though, on attainment of maximum salaries, the disparity will disappear.

The question is whether the difference represents an impermissible discrimination, or whether it has arisen reasonably out of the method of transfer from City to State payrolls.

Petitioners have cited two statutes which they claim require salary increases for them—section 39 of the Judiciary Law, and chapter 308 of the Laws of 1979. Neither Judiciary Law § 39 nor Chapter 308 of the Laws of 1979 mandates any such increases.

A. Section 39 of the Judiciary Law

Section 39 of the Judiciary Law authorized the State assumption of local court costs, and established a unified budget for the State court system. Section 39(6) transferred all employees of the Unified Court System to the State payroll, and established a comprehensive scheme for determining the salaries and benefits to which they were entitled.

Pursuant to subdivision 6(a) of Section 39, petitioners became entitled to the "salaries, wages, hours and other terms and conditions of employment to which they were entitled pursuant to any law or contract in effect immediately prior to (their transfer to the State payroll)."

Subdivision 8(a) of Section 39 required the adoption of a new classification structure and salary grade schedule

for the transferred employees. Subdivision 8(b) then provided in pertinent part:

> A non-judicial officer or employee whose position is allocated to a salary grade pursuant to paragraph (a) of this subdivision shall be placed into that salary grade at the salary received . . . immediately prior to said allocation or at the minimum of that grade, whichever is higher. *The salary* . . . within such salary grade, as determined by this paragraph, *shall establish the increment step into which the employee shall be placed and shall determine the number of years of service to be credited within such salary grade* as of . . . (April 1, 1977) . . . for the purpose of computing future increments. (emphasis added).

The Legislature thus determined that, unlike prior State-paid law secretaries who previously were allocated to salary grades at increment steps that corresponded to their prior years of State service, prior locally-paid court employees were not to be allocated to salary grades based upon years of service. Subdivision "(b) explicitly required that [t]he salary . . . establish the increment step" and that "the salary . . . determine the number of years of service to be credited within such salary grade. . . ." Section 37(4)(a) of the Judiciary Law, which requires allocations to salary grades on the basis of years of State service, applies only to prior State-paid positions and has no applicability to employees, such as petitioners, who were transferred to the State payroll pursuant to the special mandate of Section 39 of the Judiciary Law. (*See Totero* v. *Levitt*, 41 N.Y.2d 1002 [1977]).

The respondents thus had no discretion to allocate petitioners to salary grades in any manner other than the way they did—based upon their then-current salaries with the salaries themselves determining the increment step.

In the absence of any renewable exercise of discretion, the determination to place petitioners into their assigned salary grades at the salaries they were receiving prior to such allocation may not be deemed arbitrary or capricious.

Section 39(8)(b) of the Judiciary Law expressly directs that petitioners, together with all other formerly locally-paid court employees throughout the State, not receive increment credit for their prior years of local service. There is nothing in Chapter 308 of the Laws of 1979 that even hints that this chapter possibly could be used to nullify this specific mandate of section 39(8)(b) —especially for only that small group of unrepresented employees who happen to work as law secretaries in New York City.

THE CONSTITUTIONAL QUESTION

Section 39 of the Judiciary Law Does Not Deprive Petitioners of Their Constitutional Right to Equal Protection of The Law.

Petitioners' equal protection claim is premised on the difference in the allocation rules contained in section 37(4)(a) of the Judiciary Law, which applies to prior State-paid positions and section 39(8)(b) of the law, which applies to positions transferred to the State payroll as part of the 1977 State takeover when prior State-paid law secretaries were allocated to salary grade 31, they were placed in that grade, pursuant to section 37(4)(a), at increment steps that corresponded to their years of State service prior to allocation (p. 10). When petitioners were allocated to their assigned salary grade—24, 26, 28, or 31, depending upon their year of admission to the Bar —they were placed in those grades, pursuant to section 39(8)(b), at increment steps that corresponded to their salaries immediately prior to allocation. This statutorily-mandated difference in salary-grade allocation does not constitute a denial of equal protection. And the fiscal

constraints of the State provide a natural basis for the classification.

In reviewing fiscal determinations, a court's constitutional scrutiny of a legislative classification is even further restricted as legislative decisions to spend money in any particular manner "are not confided to the courts." (Matthews v DeCastro, 429 U.S. 181, 184 [1976]). It is not within the judiciary's province to pass on the wisdom, propriety or even correctness of the legislative response, (Montgomery v Daniels, 38 NY2d 41, 49-50, 64-65 [1975]; "[q]uestions as to wisdom, need or appropriateness are for the Legislature." (Matter of Pratt v Tofany, 37 AD2d 854 [2d Dept. 1971], see also, (Matter of Farrell v Drew, 19 NY2d 486, 494, [1967]). As long as there is some "reasonable basis" for the classification, equal protection is not violated simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." (Lindsley v Natural Carbonic Gas Co., 220 U.S. 61, 78 [1911]; accord, Dandridge v Williams, 397 U.S. 471, 485 [1970], rehearing denied, 398 U.S. 914 [1970]. Montgomery v Daniels, supra; Gleason v Gleason, 26 NY2d 28, 41 [1970]).

Here, the identical equal protection issue raised by petitioners already has been determined by the courts. In 1979, the Appellate Division, Third Department, upheld, as against constitutional challenge, the requirement in section 39(8)(b) that the transferred court employees be allocated to State salary grades on the basis of currently-existing salaries. (Matter of Mager v Bartlett, 69 AD2d 517 [3d Dept. 1979], lv to app. den., 48 NY2d 607 [1979]). In *Mager*, as in this proceeding, the petitioner claimed that the failure to allocate them to their assigned salary grade at an increment step equivalent to that of a prior State-paid employee with comparable years of service constituted a denial of equal protection. In rejecting

petitioners' equal protection claim, the Appellate Division ruled (69 AD2d at 519):

> "We also reject petitioners' contention that they were denied equal protection. An examination of the record in its entirety establishes that there is a rational basis for the legislative classification. (Riley v County of Monroe, 43 NY2d 144, 149)."

(See also, Walsh v Commonwealth of Massachussetts, 618 F.2d 156 (1st Cir. 1980); Employees Retirement System of Alabama 1 Oden, 369 So.2d 4 [Ala. 1979]).

State fiscal restraints uniformly have been recognized as a rational justification for dispensing scarce resources in a manner that may have an unequal impact on individuals affected by a legislative classification (see Dandridge v Williams, supra). The limited resources available to the State in assuming responsibility for local court costs provides a reasonable basis for the difference in classification between the transferred employees and the employees previously paid by the State. Moreover, the Equal Protection Clause of Constitution does not require exact equality for salaries (Cf. Ross v Moffit, 417 U.S. 600, 612 [1974]). The courts have consistently rejected as fallacious the argument that legislative classification must be made with "mathematical nicety" and must, in practice, result in no "inequality." (Montgomery v Daniels, supra, 38 NY2d at 66; see also Matthews v DeCastro, supra, 429 U.S. at 185; City of New Orleans v Dukes, supra, 427 U.S. 303; Matter of Pratt v Tofany, supra, 37 AD2d 856. The constitution simply does not require exact equality in salary.

CONCLUSION

To the extent that a declaratory judgment is sought the court declares that respondents' failure to equalize salary is not unconstitutional. To the extent that relief is

sought pursuant to CPLR Article 78, petitioners have failed to demonstrate that respondents acted in an arbitrary or capricious manner or contrary to law, or that respondents are mandated by law to pay petitioners the increases in salary which they Accordingly, the application of petitioners is denied and the consolidated petition is dismissed.

Settle judgment.

J. S. C.

Dated: June 19, 1981.

APPENDIX B

Order of Affirmance and Granting Leave to Appeal

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 4, 1982.

Present—HON. THEODORE R. KUPFERMAN,
Justice Presiding

LEONARD H. SANDLER
JOSEPH P. SULLIVAN
VINCENT R. LUPIANO
MAX BLOOM, Justices.

13475

IN THE MATTER OF THE APPLICATION OF WALTER TOLUB, DONALD COLONELLO, ROBERT C. KOHM, IRVING LEVINE, RICHARD WAGNER, JOSEPH GOLIA, NICHOLAS SAVINO, VASILIOS ARNIZOTES, CALVIN CONNELL, KATHLEEN CASEY, THOMAS KEHOE, ANGELA MAZZARELLI AND DAVID ROSENBERG, individually and on behalf of the Association of Law Secretaries to the Justices of the Supreme and Surrogates' Courts of the City of New York, and PEARLE APPELMAN, JACOB ASCHKENASY, ALBERT ASPINELL, WILLIAM E. BANFIELD, IRENE BEES, PATRICIA BROADBELT, WILLIAM K. BROUDY, PASCHAL D. CASTELLI, HARVEY CORN, WILLIAM DUGAN, PAULA B. FENTON, WALLACE L. FORD, LEONA FREEDMAN, GEORGE J. GARAFOLA, PAUL GARLAND, HARVEY GLASSER, DAVID GOLDSTEIN, LELAND GREENE, JOHN GRIMMER, RICHARD S. HUGHES, LENDSEY JONES, DAVID A. KORNBLUM, ORIN R. KITZES, RUTH STARR KORN, DANIEL T. KUZYK, PATRICK LEDDY, GERALD S. LEVINE, BURTON N. LIPSHIE, SHARON LUNDSTROM, VIVIAN MCGOWAN, VINCENT T. QUATROCHI, NATHAN RAVNER, HOWARD

ROSEMAN, MARC I. SALIS, ROBERT J. SALZBERG, IRWIN L. SCHARF, EUGENE H. SCHIFRIN, LEONA SHARPE, JACQUELINE SILVERMANN, PAUL SOBELL, MICHAEL D. STALLMAN, ESTATE OF SAMUEL TOLISANO, VINCENT A. VITALE, MURRAY WEINER, MALLALIEU S. WOOLFOLK, ANTONIO BRANDVEEN, GAIL BURROUGHS, LORIN DUCKMAN, MILTON GREEN, FRANK HANTKE, BARRY HILL, ALEXANDER HUNTER, EDWARD KAUFMAN, GERALD LABUSH, GEORGE LEVINE, NICHOLAS X. MARANZANO, GEORGE PARKER, MELVIN PAROFF, LESTER RIVELIS, MATT ROSEN, WILLIAM JAMES V. BUCCELLATO, ANTHONY J. BUFFALANO, WILLIAM F. CAMPBELL, JOHN R. CANNIZZARO, STANLEY CLARK, ROBERT GRAIG, SANTO CRUPE, ALLEN DAVID, LOUIS DIESENHOUSE, EDWARD J. DONOVAN, HARRY A. ELISOFON, MICHAEL FORMOSO, MICHAEL FREEMAN, WILLIAM J. GIORDANO, WARREN GLASNER, IRVING GOLDENBERG, SIDNEY GOODHEARTZ, JOSEPH P. GRANCIO, MARTIN HORN, MURIEL HUBSCHER, JAMES HUTCHERSON, GABRIEL M. KRAUSMAN, LESTER KRAVITZ, DONALD MARCOVITZ, DOUGLAS A. MILAZZO, ALFRED P. MOLINE, JR., JAMES MURPHY, STANLEY S. NIRENBERG, PATRICK J. PAGNANI, MILTON L. PLATT, ALFRED J. RIVERA, GERARD H. ROSENBERG, HERMAN SANDERS, MARK A. SMITH, CHARLES SPORN, DAVID VANDERPOOL, GEORGE E. WADE, JR., ROBERT WITTICH, DAVID AVRACH, SYLVIA BECK, ROBERT DUNLEAVY, ALBERT CERUSSI, MARILYN LASHIN, PATRICK LEDDY, HERMAN OFFEN, RAMON PAGAN, WILLIAM POPPY, LEON SCHECHTER, LEE SCOPP, RICHARD TOLCHIN, ERIC TOPPIN, STEVE BOOKIN, HAROLD BEELER, ALBERT ASPINALL, GEORGE GARAFOLA, JOHN RANIOLLA, JOSEPH G. BRAUNREUTHER, HAROLD F. CULLEN, ARNOLD N. PRICE, NAT WEIDENBAUM, JAMES C. MOSLEY, ABRAHAM BERKOWITZ, DANIEL LEWIS, JOSEPH RISI, PHYLLIS FLUG,

Order of Affirmance and Granting Leave to Appeal

GLORIA CIRINO, JEFFREY LEBOWITZ, RONALD SOMMER, RICHARD L. BUCHTER, ROBERT S. INVIDIATA, BRUNO SZAKMARY, THOMAS V. POLIZZI, TIMOTHY FLAHERTY, PETER M. DUFFY, MORRIS FIERSON, JOSEPH A. BONDANZA, JR., BERNARD R. MENDELOW, NATHAN STEINER, HUGH SCOTT, STUART SPITZER, SIDNEY SCHNEIDER, TERRENCE A. FLYNN, JOHN CARTAFALSA, EUGENE MATTHEWS, ROBERT L. NAHMAN, WALTER A. LASKE, DAVID ROSEN, ALAN LEVINE, BLANCHE R. LIFTOFF, PETER MENOUDAKIS, ROGER N. ROSENGARTEN, STANLEY KATZ, MARVIN K. SCHARF, ROBERTA L. DUNLOP, EUGENE BAMBRICK, JERALD LEVINE, EDWARD SCHACHTER, IRA HOFHER, DOMINICK REVELLINO, WILLIAM DERKASCH and JOHN DOE, 1-20,

Petitioners-Appellants,

—against—

HERBERT B. EVANS, as Chief Administrative Judge of the State of New York, LAWRENCE H. COOKE, as Chief Judge of the New York Court of Appeals, E. LEO MILONAS, as Deputy Chief Administrative Judge for the City of New York, HOWARD F. MILLER, as Director of the Budget of the State of New York, THE OFFICE OF COURT ADMINISTRATION of the State of NEW YORK, and THE STATE OF NEW YORK,

Respondents-Respondents.

An appeal having been taken to this Court by the above-named appellants from a judgment of the Supreme Court, New York County (Gabel, J.), entered on August 4, 1981, which, in treating consolidated actions before the court, dismissed an Article 78 proceeding seeking to compel respondents to equalize salaries and declared that failure of respondents to equalize salaries was not unconstitutional,

Order of Affirmance and Granting Leave to Appeal

And said appeal having been argued by Joseph L. Forstadt of counsel for appellants, and by John Eiseman of counsel for respondents Evans, Cooke and Milonas and Office of Court Administration; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements. This Court, *sua sponte*, grants leave to appeal to the Court of Appeals and pursuant to CPLR 5713 states that questions of law have arisen which ought to be reviewed by the Court of Appeals.

ENTER:

/s/ JOSEPH J. LUCCHI

Clerk.

APPENDIX C

Opinion

This opinion is uncorrected and subject to revision before publication in the New York Reports.

STATE OF NEW YORK COURT OF APPEALS

1 No. 579

In the MATTER OF WALTER TOLUB, &ORS.,

Appellants,

v.

HERBERT B. EVANS, as Chief Administrative Judge of the State of New York, et al.,

Respondents.

JASEN, J.:

The issue presented by this appeal is whether the various provisions of the Judiciary Law which provide the method of computing salaries for law assistants serving in the unified court system violate the petitioners' right to equal protection of the law.

Petitioners are law assistants to Justices and Judges of the Supreme Court and the Surrogate's Court in the City of New York. Prior to April 1, 1977, they were paid by the City pursuant to the City's Managerial and Executive Pay Plan. As of April 1, 1977, the responsibility for petitioners' salaries was assumed by the State pursuant to the Unified Court Budget Act of 1976. (Judiciary Law § 39, L 1976, ch 966, § 2, as amended by L 1977, ch 32, § 9.)

Subdivision (8)(a) of Judiciary Law section 39 authorized the Administrative Board of the Judicial Conference to "adopt a classification structure for all non-judicial officers and employees who become employees of the state of New York pursuant to this section." The statute further specified that the classifications should be

in accordance with the "duties required to be performed" and that a salary grade should be designated for each person becoming a state employee because of the unification of the courts.

Subdivision (8) (b) of section 39 of the Judiciary Law further provides that when a non-judicial employee is allocated to a salary grade in accordance with subdivision (8) (a), he shall be placed "into that salary grade at the salary received by such officer or employee immediately prior to said allocation or at the minimum of that grade, whichever is higher." The salary grade, in turn, determines the incremental step each employee covered by this statute is assigned. For the purposes of determining future increments, the number of years service was computed on the basis of the increment step determined when the employee's prior salary was converted to the state payroll. After the initial conversion, all employees would then receive the same increment credit for each subsequent year of service.

In November of 1977, Article VI, section 28 of the New York State Constitution was adopted. That provision created an Administrative Board for the unified court system and authorized the Chief Judge of the Court of Appeals, who was appointed Chief Judicial Officer of the unified court system, to appoint a Chief Administrator. Standards and administrative policies for the courts are now promulgated by these administrators with the approval of the Court of Appeals. (N Y Const, Art 6, § 28, subd [c].)

Pursuant to that change in administration, the Chief Administrative Judge was charged with formulating a new classification plan for employees. This plan was adopted in May 1979. The plan was designed to allocate to each court title of the unified court system a salary grade. All law clerks in trial level courts, whether pre-

viously paid by the State or local government, were assigned a grade on the basis of the number of years they had been admitted to the bar.

Salary assignments within each grade were computed pursuant to the dictates of Judiciary Law section 37(4) and section 38(b). Those clerks who had previously been State employees were assigned a salary grade according to the number of years they had been admitted to the bar and an increment step within that grade based on the incremental step they had previously attained in State service. (Judiciary Law § 37[4][a].) Law clerks who previously were paid by local governments were similarly assigned a salary grade on the basis of the number of years they had been admitted to the bar. Their incremental step, however, was determined pursuant to the mandates of Judiciary Law section 38(b). This statute requires that they be assigned to the minimum salary within the proper grade unless that salary was below the salary they had been earning. In that case, they were assigned to the incremental level which provided them with an equivalent salary. In no case did anyone incur any loss of salary. Indeed, all the petitioners were earning salaries greater than the minimum for their classification and, thus, were placed on incremental steps within their classifications so that they incurred no loss.

The effect, however, of these different means of converting the salaries was to create some disparity. An employee who was previously paid by the State at grade 31 level with five years of increments remained at that salary. An employee previously paid by the City of New York and admitted to the bar five or more years would be assigned to grade 31, but the incremental level would be determined not by the number of years of service but by the employee's previous City salary. Thus, that employee may have eight years of service but be placed on the third incremental level if that was sufficient to insure that his

present State salary would be equivalent to or greater than that paid by the City. As a result of this disparity, petitioners receive less salary than some prior State-paid employees with the same number of years of service. Additionally, although they receive the same percentage salary increases, the actual increase they receive is smaller than that received by prior State employees because the base on which the percentage is computed is smaller.

Petitioners commenced these actions to redress this inequality. The first action is an Article 78 proceeding which alleges that respondents had the authority to grant increases in salary and increments during the two-year period that the reclassification plan was being developed. Not to have done so, petitioners argue, was an arbitrary and capricious decision designed only to keep their salaries below prior State-paid employees. The second action seeks a declaratory judgment that the failure to equalize the salaries of prior City-paid employees and prior State-paid employees is a violation of petitioners' right to equal protection of the law. The two actions were consolidated by the court.

Special Term found that although disparities existed, no one group of employees was favored. Rather, whether the prior State-paid or City-paid employees were on a higher incremental level depended on whether they were hired before or after the consolidation of the court system. In considering the Article 78 proceeding, Special Term concluded that the respondents had properly followed the dictates of Judiciary Law section 39 and their decisions could not be termed arbitrary and capricious. Concerning the declaratory judgment action, Special Term held that no violation of equal protection existed. Equal protection, the opinion states, "does not require exact equality in salary."

The Appellate Division unanimously affirmed, without opinion, and granted leave to appeal to this court. We now affirm.

Petitioners' claim that respondents acted in an arbitrary and capricious manner by not, in an exercise of their discretion, granting them additional incremental salary increases is totally without merit. We agree with the courts below that respondents acted in complete accord with the dictates of Judiciary Law section 39. That statute did not allow respondents any range of discretion on how incremental levels within a salary grade would be assigned. Rather, the Legislature specified that the incremental level was to be determined on the basis of the previously non-State-paid employee's prior salary. Since respondents acted pursuant to the statutory dictates, it cannot be said that they acted in an arbitrary and capricious manner.

The primary concern raised by these actions is whether the differential which results from an application of the statutory formula constitutes a violation of petitioners' rights to equal protection of the law. We find no reason to disturb Special Term's determination that: "This statutorily mandated difference in salary grade allocation does not constitute a denial of equal protection. And the fiscal constraints of the State provide a natural basis for the classification."

In matters concerning the allocation of the public fisc, the courts do not review the Legislature's wisdom or the propriety of their decision. (*Board of Educ.* v *Nyquist*, 37 NY2d 27, 38-39.) Rather, the scope of review is to determine whether a rational basis exists for the classification enacted by the Legislature. Particularly in matters concerning the State's budget, equal protection does not require that all classifications be made with mathematical precision. (*Dandridge* v *Williams*, 397 US 471, rehearing den 398 US 914; *Lindsley* v *Natural Carbonic Gas Co.*, 220 US 61; *Board of Educ.* v *Nyquist, supra; Walsh* v *Commonwealth of Mass.*, 618 F2d 156; *Bruce* v *Scearce*, 390 F Supp 297, affd 521 F2d 796; *Eielson* v *Parker*, 427

A2d 814; *Employees Retirement System of Alabama* v *Oden*, 369 So2d 4.)

In this case, the Legislature has more than a sufficient rational basis for designating different formulas to convert the salaries of prior State-paid employees and prior City-paid employees into a unified salary scale. The prior State-paid employees had been under a similar system making a direct transition regarding increments feasible. City-paid employees, on the other hand, were being paid under a completely different system. Thus, the Legislature chose to incorporate them into the State salary schedule, using their prior salary as a guide to the incremental level they should be placed at. This system assured that the cost of unification would be reasonably controlled and that no one would suffer any loss in salary. Thus, it cannot be said that the statutorily mandated system was irrational.

Similarly, a statutory scheme will not be struck as violative of equal protection merely because it creates differences in geographic areas. (*McGowan* v *Maryland*, 366 US 420, 427; *Salsburg* v *Maryland*, 346 US 545; *Walsh* v *Commonwealth of Mass.*, *supra*, at p 158; *Matter of Colt Industries* v *Finance Administrator*, 54 NY2d 533, 544.) As long as the State had a rational basis for making such a distinction, it will pass constitutional muster under an equal protection challenge.

In this case, there is an adequate factual basis for the Legislature to have prescribed different methods of converting court employees onto the unified court budget. During the period that the State was assuming the costs of these courts and merging the various previously used payroll systems, the Legislature deemed salary to be the controlling element in determining incremental steps for employees who had no prior State service. The Legislature determined that this would assure that all employees

would receive credit for their prior service while not requiring individual evaluations which otherwise would have been necessary to ascertain how much of each employee's prior service would have been in work comparable to that required in the salary grade petitioners were now serving in.

It should also be noted that the remaining subdivisions of section 39 insure that prior City employees will retain all their former fringe benefits. Those benefits are superior to ones enjoyed by prior State-paid employees. From this, it can be concluded that the Legislature considered the total cost of the unification of the court system in enacting the various transitional provisions. Even though the effect of these various provisions was to create geographic distinctions because an employee's prior status depended on the location of his position, there was both an historical and rational reason for making the transition in salaries in the manner prescribed by the Legislature even though in doing so distinctions would be made on the basis of locality.

It is the existence of this rational basis which distinguishes this case from *Weissman* v *Evans* (56 NY2d 458). In that case, we held that the wage disparity which continued to exist between Judges in various counties subsequent to their incorporation into the unified court system was not supported by a rational basis and, thus, violated the Judges' equal protection rights. The legislation controlling in that case indicated no legislative attempt to create an orderly transition of various systems, but, rather, only a continuation of an historical disparity. In fact, the evidence submitted indicated that defendants Evans, as Chief Administrative Judge, had repeatedly recommended elimination of the disparity because there was no reason for continuing it. Having been presented with nothing more than tradition as the reason for continuing the wage disparity, we concluded that the statute

was unconstitutional. Where significant reasons of fiscal concern and proper administration of the courts exist, we will not strike legislation merely because it creates some geographic distinctions.

We conclude that the disparity in wages created by Judiciary Law sections 37 and 39 have a rational basis in the Legislature's concern for an orderly and speedy transition to a State-wide unified court system which was created, at least in part, to alleviate the financial burden imposed by requiring fiscally strained cities and counties to fund the court system. In assuring this additional financial responsibility for local court costs, it was reasonable for the Legislature to attempt to control the cost for the unified court system and make allocations in the unified court budget in a fairly impartial and expedient manner during this transitional period.

Accordingly, the order of the Appellate Division should be affirmed.

FUCHBERG, J. (dissenting):

Though no two cases are exactly alike, one would have expected that this one would be treated as a sequel to *Weissman* v *Evans* (56 NY2d 458), in which, only some months ago, we found that the continuance of a salary disparity between Judges of the same rank in different counties of this State left us "no choice, but to declare it offensive" to the constitutionally protected right to equal protection of the law (id., at 466). I see no essential difference between that case and this one.

True it is that, in *Weissman*, some of the Judges served courts in one county and the others in an adjoining one, while here some of the Secretaries serve State Judges in New York City while others serve State Judges of equal rank in non-New York City areas.

But, though it is undisputed that the services rendered by law secretaries in New York City are no less demanding than those performed by their counterparts outside of New York City, under our Unified Court System (NY Const, art VI, § 1, subd a), though both now are State employees, a secretary to a State Supreme Court Justice in New York City receives considerably less in salary than does a secretary of equal training, experience and tenure attached to a Justice of the same court in another part of the State. Moreover, under a salary scheme which provides a lockstep progression through varied increment levels, the salary discrepancy will continue until a so-called "extra longevity step" is reached some ten or fifteen years later, which for many of the secretaries means the balance of their professional lifetimes. (See Judiciary Law, § 39, subd 8, par [b]). It is to challenge this condition that these proceedings were brought by the Association of Secretaries to Justices of the Supreme and Surrogate's Courts of the City of New York and its members.

The problem has its genesis in the Unified Court Budget Act of 1976 (L 1976, ch 966), legislation designed, among other things, to eliminate precisely the kind of disparities at issue here. Prior to unification, the petitioners, though employed by State-paid Justices, were carried on the payroll of local governments, while those performing identical duties in the remainder of the State, were paid by that branch of government. The Act, in harmony with the plan of the newly-formed court unification system (see *Weissman* v *Evans*, *supra*, at pp 462-463) and the State's long-standing policy "to provide equal pay for equal work" (Civil Service Law, § 115), was expected to eliminate such distinctions by merging all these employees into a single personnel structure. Instead, however, as applied, the statute froze most New York City law secretaries into their inferior salary status

and, to boot, perpetuated these pre-existing disparities by using the payrolls of the local governments to which they once were charged as a base for fixing their future earnings. This arrangement, as applied to petitioners, creates distinctions, which, lacking a rational basis, deny them equal protection (NY Const, art I, § 11; US Cons, 14th Amdt, § 1).

Respondents have sought to justify this discrimination essentially on four grounds, one historical, the second geographical and the last two fiscal.

The historical one hardly need detain us. We made clear in *Weissman* that, so far as the State court system is concerned, "however intrenched the local influence at one time may have been", it lost its viability when court unification finally arrived (*Weissman* v *Evans*, *supra*, at 464).

As to the geographical excuse respondents offer, we observed that "while equal protection does not necessarily require territorial uniformity * * * '[a] territorial distinction which has no rational basis will not support a state statute'" (*Weissman* v *Evans*, *supra*, at 464-465, quoting from *Manes*, v *Goldin*, 400 F Supp 23, 29 [three-Judge court], affd 423 US 1068 [citations omitted]). Ironically, since the respondents have not disputed the fact that, if anything, the greater complexity and volume of litigation pending in the courts of the City of New York render petitioners' tasks more onerous, discrimination in favor of, rather than against them, would appear to be the only kind that could be in order.

Moreover, analysis of the cases cited by the majority emphasizes the point. For the distinction upheld in each was one peculiarly and unmistakably related to the area singled out (*McGowan* v *Maryland*, 366 US 420 [upholding statutory exemption from Sunday closing laws for retailers selling merchandise in resort area]; *Salsburg* v

Maryland, 346 US 545 [pre-*Mapp* v *Ohio* (367 US 643), case, permitting State to use illegally obtained evidence in one highly urbanized part of Maryland where there was an ususually high increase of gambling]; *Walsh* v *Commonwealth of Mass.*, 618 F2d 156 [upholding the payment of higher salaries to court officers in Boston solely because of the especially onerous duties of court officers in that city]; *Matter of Colt Industries* v *Finance Administrator*, 54 NY2d 533; 544-545 [upholding legislation restricting admissibility of State equalization rates in New York City and Nassau County solely because of the "high density of population and diversity of property" in those areas]).

Of the majority's two fiscal thrusts, one is that, by keeping petitioners' wages in tow, "reasonable control" of "the cost of unification" might be achieved. This, I respectfully venture, is most outlandish. The issue here is not whether the Legislature had the right to save money when it embarked on the court unification plan. Rather, it is whether the State could enact a Statute which imposes a disproportionate share of the costs of its scheme on one class of persons. Certainly, respondents would not contend that the Legislature could constitutionally justify a decision to give red-haired law secretaries lower salaries than all others simply by claiming that it did not have enough money to pay all law secretaries equal salaries. For identical reasons, the State cannot use that justification to support its discriminatory treatment of petitioners, who were classified on a similarly arbitrary basis, i.e., the identity of the government unit that paid their salaries prior to April 1, 1977. In short, "fiscal constraints" alone cannot justify disparate treatment of equals.

Allocatable to the fiscal category too, I suppose, is the majority's supposition that the Legislature in fact had equalized law secretarial wages by charging the New York City contingent with its fringe benefits, such as they were. To this there are several short answers. To take three:

1. Overall, as respondents themselves agreed and as Special Term concluded, substantial and material disparities in salaries unfavorable to prior City-paid secretaries *do* exist. 2. Special Term expressly found that "fringe benefits do not constitute 'salary' within the purview of Judiciary Law section 39 (6) (c) and cannot be added into the equation for the purpose of determining comparability of salary". 3. There is just no proof of any such legislative calculation or intention.

For all these reasons, I vote to reverse the order of the Appellate Division and to grant judgment to the petitioners declaring Judiciary Law, § 39 (subd 8 par [b]) unconstitutional.

* * * * *

Order affirmed, with costs. Opinion by Judge Jasen in which Judges Jones, Wachtler and Meyer concur. Judge Fuchsberg dissents and votes to reverse in an opinion in which Judge Gabrielli concurs. Chief Judge Cooke took no part.

Decided November 18, 1982

APPENDIX D

Notice of Appeal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 02930/80

In the Matter of the Application of
WALTER TOLUB, et al.,

Petitioners,

—against—

HERBERT B. EVANS, et al.,

Respondents.

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

No. 579 (1982)

In the Matter of the Application of WALTER TOLUB, individually and on behalf of the Association of Law Secretaries, et al.,

Petitioners-Appellants,

—against—

HERBERT B. EVANS, et al.,

Respondents-Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Walter Tolub, individually and on behalf of the Association of Law Secretaries, et al., the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, affirming the dismissal of the complaint, entered in this action on November 18, 1982.

Notice of Appeal

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

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Dated: New York, New York
February 9, 1983

To: PAUL A. FEIGENBAUM

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APPENDIX E

Constitution of the United States

AMENDMENT XIV.

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Judiciary Law of New York

Section 39, Subdivisions 8(a) and 8(b)

8. (a) The administrative board of the judicial conference shall adopt a classification structure for all non-judicial officers and employees who become employees of the state of New York pursuant to this section which shall provide for the classification of positions in accordance with duties required to be performed in title in these positions and in accordance with the responsibilities of the position and the volume of work in the court or court-related agency in which the position exists. Nothing in this section shall prohibit the subsequent restructuring of the classification and duties of employees in accordance with the rules of the administrative board. The administrative board in accordance with section two hundred nineteen of this article shall determine, retroactive to April first, nineteen hundred seventy-seven, the salary grade of each employee who becomes an employee of the state of New York pursuant to this section; provided, however, nothing herein contained shall be deemed to diminish: (i) the right of any employee organization to negotiate wages or salaries pursuant to article fourteen of the civil service law, or; (ii) the right of any employee to receive

wages or salaries pursuant to subdivision six of this section. Notwithstanding any other provision of law, an application to the public employment relations board seeking a designation by the board that certain persons are managerial or confidential may be filed at any time before April first, nineteen hundred seventy-eight, and thereafter pursuant to the provisions of the civil service law.

(b) A nonjudicial officer or employee whose position is allocated to a salary grade pursuant to paragraph (a) of this subdivision shall be placed into that salary grade at the salary received by such officer or employee immediately prior to said allocation or at the minimum of that grade, whichever is higher. The salary of such officer or employee within such salary grade, as determined by this paragraph, shall establish the increment step into which the employee shall be placed and shall determine the numper of years of service to be credited within such salary grade as of April first, nineteen hundred seventy-seven, for the purpose of computing future increments. Each employee shall thereafter receive increment credit for each subsequent year of service in such position up to the maximum prescribed by section two hundred nineteen of this article.

No. 82-1382

Office-Supreme Court, U.S.
FILED
MAR 16 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

In the Matter of the Application of WALTER TOLUB, individually and on behalf of the Association of Law Secretaries, et al.,

Appellants,

vs.

HERBERT B. EVANS, et al.,

Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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No. 82-1382

In The

Supreme Court of the United States

October Term, 1982

In the Matter of the Application of WALTER TOLUB, individually and on behalf of the Association of Law Secretaries, et al.,

Appellants,

vs.

HERBERT B. EVANS, et al.,

Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

STATEMENT

This motion to dismiss or affirm pursuant to Rule 16 of the Supreme Court Rules is made by appellees, Hon. Lawrence H. Cooke, Chief Judge of the State of New York, Hon. Herbert B. Evans, Chief Administrative Judge of the Unified Court System of the State of New York, Hon. E. Leo Milonas, former Deputy

Chief Administrative Judge for the courts in New York City and the New York State Office of Court Administration ("court appellees") and Howard Miller, Director of the Budget of the State of New York and the State of New York ("state appellees"), in response to appellants' jurisdictional statement, invoking the jurisdiction of this Court pursuant to 28 U.S.C. §1257(2), to hear their appeal from an order of the New York Court of Appeals that upheld the constitutionality of Section 39(8)(b) of the New York Judiciary Law.

Appellants claim on appeal that their rights were violated by appellees under the equal protection clause of the Fourteenth Amendment of the United States Constitution by failing to equalize salaries between appellants, prior New York city-paid law clerks who were transferred to the state payroll on April 1, 1977, and prior state-paid law clerks with the same number of years' experience. Appellees move to dismiss or affirm this appeal on the grounds that the equal protection claim raised by appellants is too insubstantial to permit this Court to take jurisdiction.

A. The Unified Court Budget Act

On August 5, 1976, during an Extraordinary Session of the New York Legislature dealing solely with court reform, the Legislature enacted the Unified Court Budget Act. (McKinney's Session Laws of New York, L. 1976, c. 966, as amended; now codified as Section 39 of the Judiciary Law). This Act provided that, effective April 1, 1977, the state would assume the expenses of all of the courts of record in New York previously paid by the various localities. In the largest and most complex transfer of fiscal responsibility for a court system ever made in the United States, more than 8,500 nonjudicial court employees, including appellants, were transferred from scores of different local payrolls onto the state payroll as state employees (Jurisdictional Statement, p. 4a). This Act was intended to permit the state court system

to operate more efficiently and effectively by having centralized control of all its resources, and was in response, in part, to the inability of some localities to adequately fund the courts or to maintain then-existing staffing and service levels.

Because the court employees had been paid by well over 100 different counties and cities, each had received different salaries and fringe benefits provided by the localities, either by administrative determination or through collective bargaining agreements. The State Legislature chose to preserve all these salaries and benefits; it directed that these employees "be entitled to the salaries, wages, hours and other terms and conditions of employment to which they were entitled pursuant to any law or contract in effect immediately prior to the effective date hereof. . . ." Judiciary Law, §39(6)(a). Further, the Legislature "froze" all existing collective negotiating units, directing that they could be merged only with the consent of the units themselves. Judiciary Law, §39(7). In sum, the transfer of the locally-paid court employees to the state payroll preserved their former local terms and conditions of employment virtually intact.

In providing for a coherent means of assimilating this large number of employees onto the state payroll, together with a simultaneous assumption of substantial non-personnel expenses, the Legislature directed that a classification structure of titles for these new employees be adopted based upon their duties and responsibilities and that salary grades be given to each title. Judiciary Law §39(8)(a). The Legislature further provided that each employee be allocated to his salary grade either at the minimum salary level of the grade or at his then-current salary, whichever was higher. Judiciary Law, §39(8)(b). Where the current salary was used as a basis for allocation, that salary determined the increment step[1] within the salary grade, and future increments

1. Judiciary salary grades contain a minimum starting salary for the first year of service, increment steps for the next four years of service, a longevity step (Cont'd)

were earned and calculated from this base. Judiciary Law, §39(8)(b); *see* Jurisdictional Statement, pp. 6a-7a.

1. The Effect of the Unified Court Budget Act on Appellants

The 8,500 prior locally-paid court employees came onto the state payroll with completely different terms and conditions of employment, depending on which locality paid them and which collective bargaining unit they belonged to, if they happened to belong to such units, as most of them did. Their initial salary treatment under the Act then depended upon the title to which they were classified under the new classification structure established pursuant to the Act. Once allocated to a salary grade as defined by their titles, they were to, and did, receive salary increases based upon their respective collective bargaining agreements, or, if not represented, by administrative action.[2]

Appellants, a group of 176 Supreme Court[3] law clerks who comprise but a handful of the 8,500 transferred employees, had been paid by the City of New York prior to the state takeover. Upon the takeover, they were assigned Law Clerk titles and allocated to the appropriate salary grades for those titles based upon their then-current salaries, as they all had been earning salaries above the minimum of their new salary grades

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(Cont'd)
for the sixth year of service, and an extra longevity step for the eleventh year of service. *See* Judiciary Law, §37(1). Each step increase represents a salary increase of approximately 3½%.

2. Allocation of titles to fixed salary grades preserves the relationships among job titles; determination of individual salaries within those grades then becomes a matter for collective negotiation. *See Evans v. Newman*, 71 A.D. 2d 240 (3d Dept.), *aff'd on A.D. op.*, 49 N.Y. 2d 904 (1980).

3. In New York, the Supreme Court is a trial-level court of general jurisdiction. *See* New York Constitution, Article VI, §7.

(Jurisdictional Statement, p. 7a). Also among the 8,500 transferred employees were full-time law clerks in County Courts, Family Courts and Surrogate's Courts outside of New York City. They were assigned the identical Law Clerk titles and salary grades as those of appellants, and they, too, were allocated to those same grades based upon their then-current salaries as paid by their respective localities. All these groups of identically-titled law clerks thus received different salaries, just as all the other 8,500 transferred employees received salaries different from those received by their counterparts in other localities — except that all transferred employees received at least the minimum salary of their newly assigned salary grades.

2. Comparison of the Salary Treatment of Prior State-Paid Employees with that of Appellants

As compared to the 8,500 employees brought onto the state payroll, there were approximately 1,500 court employees who already were paid by the state prior to the passage of the Unified Court Budget Act and who were not covered by that Act. Some of these were law clerks in the Supreme Courts outside of New York City. All these prior state-paid employees already had been classified to state salary grades, but they had been allocated to those salary grades between 1974 and 1977 based upon their number of years of service in their title (Jurisdictional Statement, p. 6a). Consequently, the salary allocation formula set forth in Section 39(8)(b) as applied to each of the 8,500 employees transferred to the state payroll differed to a degree from the salary allocation formula applied in the period before the Unified Court Budget Act for the 1,500 prior state-paid employees unaffected by the Act.

The allocation procedure at the time of the state takeover was complicated by varying methods of salary determination among all 10,000 court employees, as most belonged to the tens

of different collective negotiating units representing court employees. The classification of law clerks at issue here illustrates these differences. Appellants, prior-New York City paid law clerks, were not members of any collective bargaining units; their salaries had been fixed unilaterally and administratively by the City of New York.[4] Prior state-paid law clerks all were members of a collective bargaining unit and bargained for their salaries. Other prior locally-paid law clerks classified to the same law clerk titles as that of appellants were members of various other collective bargaining units; others had their salaries fixed unilaterally in their respective localities. These different salary determination mechanisms continued after the enactment of the Unified Court Budget Act, except that appellees now are to fix those salaries of employees not in collective bargaining units.[5]

Because of the different methods of salary allocation and salary determination among all court employees, there was no uniform relationship among the salaries of court employees during any fixed period of time. The salaries challenged here are a typical example. While some of those appellants hired before October 15, 1975, may have received lower salaries than prior state-paid law clerks with the same years of service, those appellants hired between October 15, 1975 and April 1, 1977 received *higher* salaries than prior state-paid law clerks hired between those dates. Those hired after April 1, 1977, have received salaries either *equal to*

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4. Appellants all received the same salary, regardless of length of service (Jurisdictional Statement, p. 7a). They were so treated pursuant to their deliberate choice to forego collective negotiation of their salaries so as to be part of a managerial pay plan that provided a uniform salary for all New York City-paid Supreme Court law clerks at a rate advantageous to newly-hired law clerks.

5. The New York State Public Employees Relations Board ruled in 1982 that appellants, as law clerks to judges, may not be designated as managerial employees and must be permitted to collectively negotiate for their terms and conditions of employment. Appellees have accepted this ruling.

or greater than the salaries of prior state-paid law clerks. (*See* Jurisdictional Statement, pp. 7a-8a.)

3. Comparison of Fringe Benefits Between Appellants and Prior State-Paid Law Clerks

Just as there was no consistency of salary among court employees, there was no consistency among all court employees of those fringe benefits that substitute for salary in a compensation package. Since Section 39(6)(a) of the Judiciary Law preserved fringe benefits granted by the localities, appellants continued to receive as state employees the generous insurance and retirement benefits previously granted by New York City. While appellants receive the same basic health insurance coverage as prior state-paid law clerks, they and their families are provided with additional insurance coverage, including life insurance, supplemental medical insurance, dental insurance, and optical insurance — all unavailable to prior state-paid law clerks (Jurisdictional Statement, p. 8a). In addition, appellants remained in the New York City Retirement System [*see* Judiciary Law, §39(9)], which offers more generous retirement benefits than offered by the New York State Retirement System. *Compare* New York State Retirement and Social Security Law, Title 8, *with* New York City Administrative Code, Chapter 3, Title B.

B. The Proceedings Below

In their declaratory judgment action, initiated on or about February 7, 1980, in the Supreme Court, New York County, appellants claimed, *inter alia,* that Section 39(8)(b) of the Judiciary Law denies them equal protection of the law to the extent it foreclosed allocation of their titles to salary grades based upon years of local service in those titles. The court initially found that the "significantly greater fringe benefits" enjoyed by appellants resulted in "no material disparities in total compensation

between [appellants] and prior State-paid law secretaries." (Jurisdictional Statement, p. 4a). In considering salary differences alone apart from total compensation, the court held that the limited resources available to the state in assuming responsibility for local courts provided a reasonable basis for any difference in salaries (*Id.*, p. 13a). The Appellate Division unanimously affirmed without opinion (*Id.*, p. 18a).

The Court of Appeals affirmed as well. Noting that equal protection does not require that all classifications be made with mathematical precision, the court found that the use of the prior salary of locally-paid employees as a guide to their incremental level "assured that the cost of unification would be reasonably controlled and that no one would suffer any loss in salary." (Jurisdictional Statement, p. 24a). Any disparity in salary caused by the allocation formula of Section 39(8)(b) had "a rational basis in the Legislature's concern for an orderly and speedy transition to a State-wide unified court system which was created, at least in part, to alleviate the financial burden imposed by requiring fiscally strained cities and counties to fund the court system." (*Id.*, p. 26a).

The court also found that the fringe benefits enjoyed by appellants "are superior to ones enjoyed by prior State-paid employees." (Jurisdictional Statement, p. 25a). It thereby concluded that "the Legislature considered the total cost of the unification of the court system in enacting the various transitional provisions." (*Id.*). It additionally found that enacting a system of initial salary allocations based on current salary rather than years of prior service would not require the burden of "individual evaluations" of each of the employees transferred to the state payroll (*Id.*, pp. 24a-25a).

ARGUMENT

THE EQUAL PROTECTION CLAIM RAISED BY APPELLANTS DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In seeking to have this Court accept jurisdiction of their appeal, appellants have distorted the nature of their challenge. They have presented themselves as a small group of prior New York City-paid Supreme Court law clerks who allegedly were treated dissimilarly for salary purposes from another small group of prior state-paid Supreme Court law clerks when law clerks became state employees. They argue that it was irrational to do so because the state actually "could have saved more money" (Jurisdictional Statement, p. 7) "by paying everyone the same salary as the appellants." (*Id.*, p. 10). This presentation falsely implies that the issue in this constitutional challenge is only the Legislature's treatment of two small groups of law clerks.

The issue on this appeal, indeed the only basis for this Court's jurisdiction under 28 U.S.C. §1257(2), is the constitutionality of the salary allocation provisions of Section 39(8)(b) of the New York Judiciary Law, a statute that appellants assiduously avoid mentioning in their argument. This salary provision did not apply only to the small group of appellants; it applied to all 8,500 court employees transferred to the state payroll. In short, the real equal protection issue in this appeal is whether the state could reasonably assimilate a massive number of locally-paid court employees into its payroll by preserving their current salaries, if above a statutory minimum, without making every employee's salary exactly equal. This claim is plainly insubstantial, as the Constitution does not require such equality in the circumstances of this case.

A. Appellants have not received unequal treatment when compared to prior state-paid law clerks, because there are no material disparities in total compensation between appellants and prior state-paid law clerks.

To begin with, even if this Court accepts appellants' improper focus on the two small groups of law clerks, there would be no equal protection violation, because there is no unequal treatment between these two groups. A statutory classification violates the equal protection guarantee only "when it treats persons similarly situated differently under the law." *Tigner v. State of Texas,* 310 U.S. 141, 147 (1940).

Appellants' entire equal protection claim is based upon purported differences in salary only. They ignore the fact that salary is but one component of the total compensation package available to court employees, and that court employees receive substantial fringe benefits, including different types of insurance coverage, which have a significant monetary value. No equal protection claim based upon differences in salary can be considered without also considering the various fringe benefits that substitute for salary in a compensation package. *See Confederation of Police v. City of Chicago,* 481 F. Supp. 566, 568 (N.D. Ill. 1980) ("total compensation" considered in analyzing an equal protection claim based upon an alleged disparity in one component of compensation).

When appellants were transferred to the state payroll in 1977, they continued to receive their New York City fringe benefits, which included health insurance benefits far over and above that received by prior state-paid employees. (*See supra,* p. 7.) Based on these benefits, the trial court made a specific finding that "*there are no material disparities in total compensation* between [appellants] and prior State-paid law secretaries" (emphasis supplied) (Jurisdictional Statement, p. 4a). The Court of Appeals

did not disturb this finding; indeed, it noted that the fringe benefits received by appellants "are superior to ones enjoyed by prior State-paid employees." (*Id.*, p. 25a). This equivalence in *total compensation* precludes any equal protection claim based upon an alleged disparity of but one component of total compensation — salary.[6]

B. Appellants have not received unequal treatment by the implementation of Section 39(8), because the identity of salary grades for the same court title mandated by that section provides equality of salary treatment.

In undertaking the massive transfer of court employees onto the state payroll, the Legislature was well aware that it would be virtually impossible to make salaries completely equal, since the salaries and benefits of the 8,500 nonjudicial employees transferred to the state payroll had been determined, and continue to be determined after the transfer, by scores of different collective bargaining agreements. The Legislature thus achieved the broad salary equality it set out to achieve by requiring identity of salary *grades* — not of salary. It required that court employees be classified to new titles pursuant to defined legislative criteria [Judiciary Law, §39(8)(a)], and receive at least the minimum salary of the salary grade of a legislatively-established salary schedule. Judiciary Law, §39(8)(b). Employees earning more than the minimum salary were allocated to a salary grade at their then-current salaries. This achieved a broad equalization of salaries by establishing fixed minimum salaries, while at the same time

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6. Appellants' isolating of individual components of compensation as being required to be equal, if taken to its logical conclusion, would create an equal protection principle that mandates that all fringe benefits, as well, be provided at the highest level received by any similar group of employees. Under this logic, the prior state-paid law clerks now would be entitled to bring an action asserting a constitutional right to the additional health insurance benefits received by appellants.

permitting court employees to retain without diminution whatever salaries and benefits they had been receiving from the localities.

The essence of a salary grade schedule with salary ranges is that it fixes limits. The judicial salary sche[illegible]s and the salary determination rules contained in other sections of the Judiciary Law (*see* Section 37) combine to place both a minimum and a maximum limitation on the salaries earnable within salary grades. All newly-hired employees in the law clerk titles thus are hired at the same minimum level.[7] As appellants and all other similarly-graded prior locally-paid and prior state-paid law clerks reach the maximum salary limitations of their same grades, class-wide salary disparities become reduced or eliminated. *See* Jurisdictional Statement, p. 9a (". . .on attainment of maximum salaries, the disparity will disappear").

Broad equality of salary based upon identical salary grades in a structured salary schedule is all that is required by the Constitution. The Constitution does not require exact equality in salaries or a "perfect pay system." *McCorkel v. United States,* 559 F. 2d 1258 (4th Cir. 1977), *cert. denied,* 434 U.S. 873 (1978); *see also, Bruce v. Scearce,* 390 F. Supp. 297 (E.D. Missouri 1975), *aff'd,* 521 F. 2d 796 (1976) (salary cap on some employees earning above $25,000 does not offend equal protection even though no restrictions on employees in other agencies); *cf., Ross v. Moffit,* 417 U.S. 600, 612 (1974). The courts consistently have rejected the assumption that legislative classifications must be made with "mathematical nicety." *Mathews v. DeCastro,* 429 U.S. 181, 185 (1976); *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976).

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7. Employees who are promoted within title series receive salaries pursuant to the complex salary determination requirements of Section 37(5) of the Judiciary Law, which in many instances allocates employees to their new titles based upon their current salaries without regard for years of service. Thus, there frequently is not exact equality of salary within salary grades even among employees with the same years of service.

As long as appellants have the same salary grades in the same salary schedules as their prior state-paid counterparts, as they have, they are not receiving any unequal salary treatment. *Cf., Phelps v. Board of Education,* 300 U.S. 319 (1937) (upholding unequal salary treatment of public employees in different salary groupings).

C. Appellants are not similarly situated to other groups of court employees, including prior state-paid law clerks.

The equal protection guarantee applies only to differences in treatment among those who are "similarly situated." *Cohen v. Hurley,* 366 U.S. 117 (1961). "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." *Tigner v. State of Texas, supra,* 310 U.S. at 147. Appellants simply are not "similarly situated" to any other group of court employees for purposes of salary "equality", because all are subject to different means of salary determination.

The law that transferred court employees to the state payroll not only preserved all of the then-existing different terms and conditions of employment for each group of employees, Judiciary Law, §39(6), but also preserved all of the existing negotiating units for purposes of collective bargaining. Judiciary Law, §39(7). As a result, many employees in the same titles are represented by different unions who negotiate different collective bargaining agreements with the state. Other employees in these same titles in other geographical areas are not represented by any union and have their terms and conditions of employment fixed administratively by management. Mere identity of title is virtually meaningless for an equal protection analysis of salaries when the terms and conditions of employment of incumbents in the same titles are determined variously through different negotiated contracts with different unions, or unilaterally by management. *See Wisconsin National Organization of Women v. State of Wisconsin,* 417 F. Supp. 978, 986 (W.D. Wisconsin 1976)

(upholding differences in salary treatment based, in part, upon differences in the method of salary determination for represented and unrepresented employees).

Appellants now have their own terms and conditions of employment fixed unilaterally by management. The prior state-paid law clerks, to whom appellants wish to have exact salary equality (as opposed to exact equality to total compensation; *see supra*, pp. 10-11), collectively negotiate their terms and conditions of employment as part of one negotiating unit. There are other groups of law clerks throughout the state, allocated to the same titles and same salary grades as appellants, who are members of even other negotiating units and, as such, collectively negotiate for salary increases within the salary grade structure.[8] As a result, the salaries and fringe benefits of all groups of law clerks throughout the state are different. Since the salaries of law clerks throughout the state are determined by different methods, law clerks are not "similarly situated" for purposes of an equal protection analysis. Appellants certainly cannot pick and choose the group of similarly-graded law clerks with whom they wish to have salary parity.

The Constitution cannot possibly require salary parity among different groups represented by different unions in a collective bargaining context. The terms of all collective bargaining agreements reflect a give-and-take of salary and benefits, including hours of work, vacation, sick leave, health insurance, tuition reimbursement and scores of other items that are subject to collective negotiation. Salary is but one part of this bargain.

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8. Appellants' suggestion that the Legislature could have saved more money by paying all law clerks the same salary as appellants (Jurisdictional Statement, pp. 7, 10) makes no sense. The Legislature could not reduce the salaries of those law clerks earning more than appellants, as those salaries are granted pursuant to collective bargaining agreements that, by constitutional mandate, could not be impaired by the Legislature. *See* U.S. Constitution, Article I, §10.

Indeed, the very salary component of which appellants demand parity — salary increments — are themselves, by law, subject to collective negotiation. McKinney's Session Laws of New York, L. 1972, c. 283, §62. Any constitutional requirement that groups of employees within and without different negotiating units must receive the same terms and conditions of employment, including salary, would cast grave doubt on the viability of the entire collective negotiation process.

D. The legislative classification mandated by Section 39(8)(b) of the Judiciary Law is rationally related to the achievement of valid governmental objectives.

In reviewing equal protection challenges to statutory classifications affecting economic issues, the courts long have recognized that the Legislature has "broad" discretion in enacting such classifications. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). A legislative classification will not be disturbed if "any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

Even assuming that appellants have been treated unequally, which they have not, and even assuming that appellants are similarly-situated to prior state-paid law clerks, which they are not, appellants still have not presented a substantial equal protection question, because the difference in classification between appellants and prior state-paid law clerks is rationally related to the achievement of valid governmental objectives — the assumption of responsibility for local court costs and the establishment of a unified court budget for the Unified Court System. *See* McKinney's New York Sessions Laws, L. 1976, c. 966, §1. The Legislature's allocation of appellants and the 8,500 other transferred employees to state salary grades based upon their then-current salaries was not only rationally related to the achievement of these twin objectives, but, given the state's limited

fiscal resources and the diverse salaries and benefits of these employees, it was the only viable method of achieving these objectives.

1. The limited funds available to implement the state's assumption of local court costs and the establishment of a unified court budget provides a rational basis for the transfer of court employees to the state payroll at their then-current salaries without additional salary increases based upon years of service.

Section 39 of the Judiciary Law was enacted to enable the state to assume responsibility for local court costs and to create a unified court budget funded by the state so that monies and manpower could be allocated when and as needed, unimpeded by artificial local boundaries and the varying fiscal capabilities of the localities. L. 1976, c. 966, §1. Reaching these objectives, however, was an enormous fiscal undertaking by the state. Allocation of former locally-paid court employees, including appellants, to state salary grades on the basis of prior years of local service would have increased these costs astronomically. By enacting Section 39(8)(b), requiring allocation to salary grade on the basis of current salaries or the minimum of the grade, the Legislature determined that it could not afford to expend the tens of millions of dollars required to equalize everybody's salary by allocating the titles of 8,500 employees to salary grades on the basis of prior years of local service. Without this component of the comprehensive fiscal package, there would not have been any state assumption of court costs.

State fiscal constraints uniformly have been recognized as a rational justification for dispensing scarce resources in a manner that may have an unequal impact on individuals affected by a legislative classification. In *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court upheld Maryland's placing of a fixed ceiling on the amount of money that could be granted to a welfare family,

regardless of how many children were in the family. The Court reasoned (397 U.S. at 479):

> Given Maryland's finite resources, its choice is either to support some families adequately and other less adequately, or not to give sufficient support to any family.

The Court concluded that a state may sustain "as many families as it can." 397 U.S. at 480. As Chief Justice Warren stated in *McDonald v. Board of Education*, 394 U.S. 802, 809 (1969);

> [A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

In sum, faced with the pressing need to centralize court expenses into one budget, but also faced with the enormous fiscal impact of that undertaking, the Legislature chose to maintain the current salaries of the locally-paid employees and mandate equality of salary grades, rather than exact equality of salaries, for the transferred employees. *See supra*, pp. 17-20. This preserved existing salaries for the transferred employees, while giving many of them substantial increases where their salaries were raised to the minimum of their new salary grades. Under these circumstances, there is no constitutional right as demanded by appellants to exact equality of salaries calculated to mathematical precision. *See City of New Orleans v. Dukes, supra*, 427 U.S. at 303.

The merging of vast administrative and fiscal systems always requires some compromise. Because of their legislative reality, no court ever has compelled exact equalization of salaries in system-wide transfers of court employees from the localities of

the state. *See Walsh v. Commonwealth of Massachusetts*, 618 F.2d 156 (1st Cir. 1980) (upholding Massachusetts' transfer of local court employees to the state payroll without equalizing salaries); *Employees' Retirement System v. Oden*, 369 So. 2d 4 (Ala. 1979) (upholding Alabama's transfer of local court employees to the state payroll without equalizing retirement contributions); *cf. Eielson v. Parker*, 427 A.2d 814, 822 (Conn. 1980) (upholding Connecticut's court merger without equalizing judges' salaries). As the Court of Appeals here concluded:

> . . . [T]he disparity in wages created by Judiciary Law sections 37 and 39 have a rational basis in the Legislature's concern for an orderly and speedy transition to a State-wide unified court system which was created, at least in part, to alleviate the financial burden imposed by requiring fiscally strained cities and counties to fund the court system. In assuring this additional financial responsibility for local court costs, it was reasonable for the Legislature to attempt to control the cost for the unified court system and make allocations in the unified court budget in a fairly impartial and expedient manner during this transitional period.

Jurisdictional Statement, p. 26a.

2. The diversity of benefits forming a part of total compensation that could not be equalized provided an additional rational basis for allocation based upon current salaries.

Even aside from fiscal constraints, the Legislature reasonably chose in Section 39(8)(b) to allocate titles to salary grades based upon current salaries. Prior to the Unified Court Budget Act, locally-paid court employees had their salaries and benefits

determined by varying collective bargaining agreements, local ordinances or local administrative orders. *See* Judiciary Law, §39(6)(a). There was no consistency in the terms of these various contracts, laws and orders; nor was there any uniformity of method for establishing compensation for these employees.

Because of the wide diversity of salaries and benefits set forth in scores of different collective bargaining agreements and local ordinances and orders, it was virtually impossible to "equalize" the compensation of the former locally-paid employees pursuant to an artificial criterion of years of prior service. The fringe benefits received by the formerly locally-paid employees — health insurance, annual leave, etc. — forming a substantial part of their compensation, were required, by law, to be continued. Judiciary Law §39(6)(a). In recognition of this wide diversity of fringe benefits that could not possibly be equalized in a system that also mandated the retention of existing collective bargaining units [Judiciary Law §39(7)], the Legislature chose to "equalize" salaries only to the extent of mandating equal *starting* salaries for each court title. Thus, Section 39(8)(b) required allocation to salary grades at the higher of either the minimum of the grade or the employee's current salary. This achieved the legitimate objective of eliminating significant salary disparities through the classification process, while at the same time recognizing that the classification process could not accurately account for all of the other forms of compensation that may have substituted for salary in the determination of terms and conditions of employment with the individual localities. Given the wide diversity in total compensation among the transferred employees, this approach was entirely reasonable.

CONCLUSION

The equal protection claim raised by appellants is too insubstantial for this Court to accept jurisdiction of their appeal. Appellees' motion to dismiss or affirm should be granted.

Dated: New York, New York
March 11, 1983

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
MAR 29 1983
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

October Term, 1982

No. 82-1382

In the Matter of the Application of WALTER TOLUB, individually and on behalf of the Association of Law Secretaries, et al.,

Appellants,

—v.—

HERBERT B. EVANS, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Statement

This memorandum is submitted in opposition to the appellees' ~~memorandum~~ to dismiss or affirm. Our jurisdictional statement sets forth the relevant facts in detail. While the appellees have sought to obfuscate the real issue raised here with inaccurate or irrelevant factual material, the appellees do not dispute the following critical facts: The appellants (1) are career [1] law clerks to Justices of the Supreme Court of the State of New York, (2) the Justices for whom they work are employees

[1] Unlike the federal system, the state statutory scheme contemplates that appellants will serve as law clerks for their entire careers.

of the State of New York, and (3) the appellants—as the Court of Appeals acknowledged—receive "less salary" than some of their equally experienced counterparts outside New York City (J.S., App. C, p. 24a). The reason for this disparity is likewise not a matter of dispute. Prior to April 1, 1977, appellants performed the identical work for the State of New York that they perform today. They are nevertheless paid less than their counterparts elsewhere, despite the fact that their salary has been paid by New York State since April 1, 1977, and because it would cost New York State more money to pay them the same salary as their counterparts elsewhere.

The issue presented is whether the justification given for this patently discriminatory treatment is consistent with the protection afforded by the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

The appellees, implicitly conceding that such discrimination cannot be justified, begin their defense of the New York State statute here at issue, N.Y. Judiciary Law § 39(8)(b), by arguing that it does not "apply only to the small group of appellants" but "it applied to all 8,500 court employees transferred to the state payroll" on April 1, 1977. Accordingly, they suggest "the real equal protection issue in this appeal is whether the state could reasonably assimilate a massive number of locally-paid court employees into its payroll by preserving their current salaries, if above a statutory minimum, without making every employee's salary equal" (Motion, p. 9).

This is simply a misstatement of the issue. There is no suggestion that the Equal Protection Clause requires that all of the 8500 locally-paid court employees whose salaries were assumed by the State of New York be paid the same salary. The appellants do not seek salary parity

with all of the other locally-paid court employees whose salaries were assumed by New York State. They seek parity with the salary paid to employees who perform the identical duties—law clerks to Justices of the Supreme Court—who were employed by the State of New York at the time the appellants' salary was assumed by the State of New York.

While there may be a rational basis for distinguishing between law clerks or other employees of different courts located in different parts of New York State, the issue here is whether there is a basis for discriminating between two identically classified sets of employees: law clerks of the same court—the New York State Supreme Court—where the disadvantaged group works in a locale of New York State in which the work is far more difficult and complex and in which the cost of living is higher than where their higher paid counterparts work.

Because such discrimination cannot be justified, appellees, have sought to distort the record and obfuscate the real issue presented by this case. We proceed to respond to their specific arguments.

1. The appellees argue that there are "no material disparities in total compensation between appellants and prior state-paid law clerks" (Motion, p. 10). This is simply not true. While the opinion of the New York State Supreme Court Justice who rejected appellants' claim contained a brief conclusory statement to that effect at the outset of her opinion,[2] the New York Court of Appeals

[2] The appellees refer to Justice Gabel as the "trial court". There was, however, no trial here. The case was decided on the pleadings and affidavits. And appellants' affidavits demonstrated that, when calculating the value of fringe benefits by their cost to the employer, their total package of benefits and salaries was still significantly less than those of prior state-paid employees. Of course, to the extent appellees disputed this conclusion, the lower court erred in deciding the contested issue of fact on the papers. (Record on Appeal to New York Court of Appeals, pp. 162-164, 214-17.)

did not base its holding on the ground that "there are no material disparities in total compensation between appellants and prior state-paid law clerks". The majority opinion simply alluded to the fringe benefits appellants were permitted to retain, when they were placed on the State payroll, as supporting the conclusion "that the Legislature considered the total cost of the unification of the court system in enacting the various transitional provisions" (J.S. 25a).

While we are at a loss to understand the significance of this observation, it is plain that (a) the record does not support the claim that there were "no material disparities in the total compensation between appellants" and their counterparts elsewhere, (b) the appellees can cite no more than a conclusory statement in the opinion of the New York State Supreme Court Justice to support their claim, and (c) the Court of Appeals did not base its holding on that ground.

2. The appellees next argue that the New York statutory scheme at issue achieved "a broad equalization of salaries" by requiring "an identity of salary *grades*—not of salary" (Motion, p. 11). This argument is frivolous. While it is true that the same standards were employed in determining the salary grade in which appellants and their counterparts elsewhere would be placed, there is a wide disparity of salary within a grade depending on years of service. In determining which salary, within grade 31, law clerks to Justices of the Supreme Court would receive, appellants' prior years of service counted for nothing, while the salaries of their counterparts were increased based on their prior years of service. The argument that this effectuated "a broad equalization of salaries" simply flies in the face of the record.[3] Thus, for

[3] Of course, not even the majority in the Court of Appeals relied on this as a basis for sustaining the statutory scheme.

example, effective April 1, 1977, the salaries within grade 31 alone ranged from $27,842 to $31,642 [Judiciary Law, § 38(1)(a)]. To argue that two individuals are receiving "equal" salaries where one receives nearly $4,000 a year less than another simply because they both are assigned to the same arbitrarily defined "grade," is nonsense. The Equal Protection Clause is simply not satisfied by characterizing unequal treatment as "broadly" equal.

3. The appellees argue that the appellants are not "similarly situated" to prior "state-paid law clerks" because—prior to April 1, 1977—when they were placed on the payroll of New York State, their salary was determined in a different way than the salary of their counterparts elsewhere (Motion, p. 13-14). The prior anomalous statutory scheme, by which appellants were paid by New York City, even though they worked for New York State, cannot possibly provide a rational basis for continued discrimination against them now that they are employees of New York State. Indeed, here again, the appellees have sought to avoid the force of this argument by reframing the appellants' argument. The appellees claim that "all groups of law clerks throughout the State are different" because their salaries are the product of collective bargaining agreements "and that the appellants cannot pick and choose the group of similarly-graded law clerks with whom they wish to have parity" (Motion, p. 14).

The fact is, however, appellants' salary was not the product of a collective bargaining agreement with New York State, because they were not employed by New York State prior to April 1, 1977.[4] More significantly, appellants seek parity only with respect to the only other group of law clerks who, like themselves, worked, at all relevant times, for Justices of the Supreme Court of the

[4] Appellants were not part of a collective bargaining group while in New York City service either.

State of New York and performed the same duties that they did. Indeed, they recognize that there may be a rational basis to distinguish between themselves and law clerks employed in different courts. The distinction, however, would suggest that appellants be paid a greater salary, not a lesser amount.

4. The appellees' last argument—that the discrimination here challenged is "rationally related to the achievement of valid governmental objectives" (Motion, p. 15) assumes that the issue is whether all 8500 locally-paid employees who became New York State employees had to be paid the same—or a particular—salary (Motion, p. 16). We have already shown that this assumption does not accurately reflect appellants' position. The issue is not whether the Legislature was required "to expend the tens of millions of dollars to equalize everybody's salary by allocating the titles of 8,500 employees to salary grades on the basis of prior years of local service" (Motion, p. 18), it is simply whether all law clerks to Justices of the Supreme Court of the State of New York, who have the same qualifications and years of professional experience, should be paid the same salary.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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